Supreme Court, U.S.
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No. 03-565

IN THE

# Supreme Court of the United States

KODAK RETIREMENT INCOME PLAN AND
KODAK RETIREMENT INCOME PLAN COMMITTEE,

*Petitioners,*

v.

SALLY J. BURKE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

Respondent does not dispute that the question presented in this case is both important and recurring. *See* Pet. 20; *see also* Br. of The ERISA Industry Committee as Amicus Curiae 2 ("The petition in this case presents a question of unusual importance to employers throughout the nation who sponsor employee benefit plans . . . ."). Nor does Respondent seek to defend the court of appeals' decision on the merits, or to argue that the facts or procedural posture of this case make it anything less than an excellent vehicle for resolving the question presented. Instead, Respondent offers only two arguments in her brief in opposition: first, that there is no circuit split on the question presented; and second, that any argument about the appropriate treatment of omissions in Summary Plan Descriptions – as distinguished from affirmative misstatements – is not properly presented. Respondent is wrong on both counts.

### I. This Case Squarely Implicates An Acknowledged Circuit Split

Respondent first contends that, in fact, the courts of appeals are not divided with respect to the question presented in this case. Br. in Opp. 3-7. Respondent is simply wrong. The Second Circuit – both in this case and in prior decisions – has frankly acknowledged the split, as have other courts and treatise-writers. *See, e.g.*, Pet. App. 13a ("The circuits are divided over whether detrimental reliance or prejudice is required to recover in deficient SPD cases."); *Layaou v. Xerox Corp.*, 238 F.3d 205, 212 (2d Cir. 2001) ("The circuit courts are divided as to whether proof of actual detrimental reliance upon a faulty SPD is a prerequisite to recovery."); *Burstein v. Retirement Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 380 (3d Cir. 2003) ("[O]ther Courts of Appeals that have spoken to this issue have taken differing positions."); ABA Section of Labor and Employment Law, *Employee Benefits*

*Law* 1000 (2d ed. 2000) ("The courts have split on the extent to which reliance and/or prejudice must be proven where there is a discrepancy between the SPD and the plan document.").

Respondent leads off her argument with the assertion – bolstered by an impressive-looking string-cite – that "[v]irtually all of the Circuit Courts have held that when there is a conflict between an SPD and a Pension Plan, the SPD controls." Br. in Opp. 3. But that statement merely begs the question presented here: *Under what circumstances* does an SPD trump the plain terms of an ERISA plan? As explained in the Petition, different courts of appeals have answered *that* pivotal question in very different ways. Two circuits (the Seventh and Eleventh) have said that an SPD controls only where the plaintiff can prove detrimental reliance. *See* Pet. 9-12. Two others (the Third and Sixth) have imposed a form of strict liability on employers, under which an SPD controls even without *any* showing of reliance or prejudice. *See id.* at 12-14. And five circuits (the First, Second, Fourth, Eighth, and Tenth) have applied some variant of an amorphous standard under which an SPD controls upon a showing of possible or likely prejudice or reliance. *See id.* at 14-16. Indeed, Respondent ultimately acknowledges that "[i]n addition to requiring proof of the defect in the SPD" the courts of appeals "require some additional proof of the effect of that defect prior to recovery by a plan participant or a beneficiary," and that "[t]he language chosen by the various courts is describing that additional quantum of proof has varied." Br. in Opp. 3-4.[1]

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[1] There is nothing to Respondent's suggestion that the Second Circuit decided only a "burden of proof" question that is somehow separate and distinct from the "standard" question that has divided the circuits. The Second Circuit expressly addressed the question "[w]hether ERISA requires the beneficiary to demonstrate reliance upon a deficient SPD," (...continued)

In the end, Respondent takes issue with the Petition's explanation of the prevailing law in only two courts – the Seventh Circuit, which the Petition described as a "detrimental reliance" jurisdiction (Pet. 9-10), and the Sixth Circuit, which the Petition put in the "neither reliance nor prejudice" camp (*id.* at 12-13). Respondent rightly does *not* dispute the Petition's characterization of the Eleventh Circuit as requiring a showing of detrimental reliance (*see id.* at 10); the First, Second, Fourth, Eighth, and Tenth Circuits as requiring a showing of possible or likely prejudice or reliance (*see id.* at 14-16); and the Third Circuit as requiring a showing of neither (*see id.* at 12-14). Thus, a three-way split remains even if one accepts Respondent's arguments concerning the state of the law in the Sixth and Seventh Circuits.

But those arguments are wrong in any event. As for the Seventh Circuit, Respondent asserts that "the statements relied upon by Petitioner were in the form of dicta in the course of an opinion." Br. in Opp. 4. With respect to *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703 (7th Cir. 1999), for instance, Respondent says that "the opinion clearly states that the Court was not ruling upon the issue of reliance in connection with conflicts between [SPDs] and the plan wording itself." Br. in Opp. 4. For support, Respondent points to language in the opinion in which the court says that "[w]e need not get into the issue of reliance here . . . ." *Id.* (quoting *Health Cost Controls*, 187 F.3d at 711). The context makes perfectly clear, however, that what the Seventh Circuit meant was that it did not need to "get

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and expressly decided that question by "adopt[ing] a prejudice standard." Pet. App. 13a. The Second Circuit's brief discussion of the burden of proof for a showing of prejudice, *see id.* at 16a, simply fills in the details of that court's particular variation on the admittedly "amorphous" prejudice standard, *id.* at 15a.

into the issue of" whether the plaintiff in that case had proven detrimental reliance, *not* the antecedent question – which the Seventh Circuit had already answered in the affirmative – whether proof of detrimental reliance is required in the first place. Indeed, in the paragraph immediately preceding the language Respondent quotes, the *Health Cost Controls* court reiterated the governing rule in the Seventh Circuit that when "the plan and the [SPD] conflict, the former governs . . . unless the plan participant or beneficiary *has reasonably relied on the [SPD] to his detriment*." 187 F.3d at 711 (emphasis added) (citations omitted).

In short, the Seventh Circuit has settled – firmly – on a detrimental-reliance standard. Indeed, ultimately, Respondent does not contend otherwise. She does not, for instance, maintain that the Seventh Circuit's repeated affirmations of the detrimental-reliance standard somehow leave room for doubt as to the appropriate rule, or suggest that the circuit is flirting with a different standard. Nor could she – the case law is clear. *See, e.g.*, *Helfrich v. Carle Clinic Ass'n, P.C.*, 328 F.3d 915, 918 (7th Cir. 2003) (referring to "the rule" that "summary plan descriptions, if relied on, trump the plan"); *Andersen v. Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996) ("erroneous information in a summary plan description" does not give rise to a valid claim "without a showing of bad faith, active concealment or detrimental reliance").

As for the Sixth Circuit, Respondent claims that a close reading of *Edwards v. State Farm Mutual Automobile Insurance Co.*, 851 F.2d 134 (6th Cir. 1988), "clearly indicates" that the court there "adopted a reliance or possible prejudice standard." Br. in Opp. 6. Again, it bears emphasis that even if Respondent were right about the Sixth Circuit, the three-way circuit split would remain, as there is no dispute that the Third Circuit now permits recovery without any showing of either reliance or prejudice. *See* Pet. 13-14 (describing *Burstein v. Retirement Account Plan for*

*Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365 (3d Cir. 2003)); Br. in Opp. 6 (same). But Respondent is wrong about the Sixth Circuit, in any event. The *Edwards* court stated, in no uncertain terms, that "[a]lthough in the instant case, the appellee relied to his detriment upon the language" of the SPD, "existing precedent does not dictate that a claimant who has been misled by summary descriptions must prove detrimental reliance." 851 F.2d at 137. To make the point even clearer, the court then emphasized that it would not "undermine" what it viewed as Congress's "legislative command" prohibiting misleading SPDs by imposing any "technical requirements" on ERISA plaintiffs. *Id.* Based on this language in the *Edwards* opinion, the Second Circuit in this case correctly observed that the Sixth Circuit "require[s] neither reliance nor prejudice." Pet. App. 13a-14a.

Thus, Respondent is simply mistaken in asserting that there is no circuit split concerning the question presented here. Respondent's nitpicking cannot change the fact that the Seventh Circuit has clearly settled on a detrimental-reliance rule, or the fact that the Sixth Circuit requires neither reliance nor prejudice as a prerequisite to recovery. And, in any event, as explained above, even if Respondent were right about the Sixth and Seventh Circuits, a three-way circuit conflict would remain. For all of the reasons specified in the Petition, this Court should grant certiorari, resolve the persistent split, and bring coherence to this area of ERISA doctrine.[2]

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[2] Respondent rightly does not seek to place any weight on the Second Circuit's conclusory statement that "[w]e disagree that the record precludes a finding of detrimental reliance." Pet. App. 13a. The Second Circuit offered no explanation or support for this throw-away statement, which in any event stops well short of an actual finding of detrimental reliance, or even a declaration that the Second Circuit would have made such a finding if it had been in the district court's place. For its part, the (...continued)

## II. Respondent Is Wrong To Suggest That The "Issue" Whether Omissions And Misstatements Should Be Treated Similarly Is Not Properly Presented

In three short paragraphs, Respondent charges Petitioners with "attempt[ing] to raise, for the first time in connection with its application to this Court, the issue of whether omissions in SPDs are to be treated the same as affirmative misstatements." Br. in Opp. 7. Of course, this argument does not answer the Petition's main thrust – that there is an acknowledged and persistent circuit split concerning whether an ERISA plaintiff seeking to recover based on a discrepancy between an SPD and a formal plan document must show (i) detrimental reliance, (ii) possible or likely prejudice, or (iii) neither reliance nor prejudice. *See supra* Part I. In any event, Respondent's effort to show waiver (or something like it) is misguided, for several reasons.

*First*, Respondent is wrong to describe the appropriate treatment of omissions in SPDs as a stand-alone "issue" in this case. Petitioners' principal purpose in highlighting the circuits' divergent approaches to SPD silence (*see* Pet. 16-19) was to show the extent of the

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district court expressly found that *there was no evidence* in the record that Respondent had relied to her detriment on the SPD. *Id.* at 28a. To the contrary, the district court found: "In fact, [Respondent] testified that she never reviewed the SPD, and that her husband's decision not to list her as a domestic partner was an affirmative decision so as not to jeopardize health insurance coverage." *Id.* at 27a. The district court's factual findings lead directly to the conclusion that Respondent did not show detrimental reliance. Indeed, the findings indicate that Respondent and her husband would have acted no differently if the SPD had included a seventeenth repetition of the affidavit requirement in the section summarizing SIB. The Second Circuit did not suggest any basis for rejecting these factual findings as clearly erroneous.

confusion in the courts of appeals over the proper approach to alleged discrepancies between SPDs and plan documents. Some courts demand proof of detrimental reliance, others require a lesser showing of reliance or "possible prejudice," and still others require nothing at all. Likewise, some courts permit an SPD's silence to trump plan language, while a number of others do not. The circuits are, as the Petition says, in "complete disarray" (*see id.* at 9), and their divergent approaches to SPD silence are indicative of that disarray.[3]

*Second*, Respondent is wrong to suggest Petitioners are barred from arguing in this Court that omissions in SPDs should be treated differently from affirmative misstatements. Respondent does not dispute that the Question Presented in the Petition fairly includes the question how omissions in SPDs should be treated. *See* Sup. Ct. R. 14.1(a). Further, this Court's precedents make clear that parties waive *issues*, not *arguments*: "'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 (2000) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992)). Any argument that an SPD's silence cannot trump plan language is just that – an *argument* in support of Petitioners' basic contention that Respondent's claim here is not cognizable under ERISA Section 502(a)(1)(B).[4]

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[3] Although Respondent attempts to distinguish the "omission" cases on the ground that they involved welfare plans rather than pension plans (Br. in Opp. 7-8), the courts' opinions do not suggest that any such distinction should matter with respect to the appropriate treatment of SPD silence.

[4] Petitioners did not overlook the "omission" point in the Second Circuit. Their briefs in that court referred to Respondent's allegation that the SPD "does not specifically state the need for an affidavit of domestic partnership." Pet. C.A. Br. 7; *see also id.* at 34 ("alleged failure of the SPD to clearly state than an Affidavit of Domestic Partnership must be (...continued)

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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signed and filed in order to be eligible for domestic partner for SIB"). The Second Circuit's opinion, too, clearly recognizes that the alleged deficiency in the SPD involves an omission rather than a misstatement. *See* Pet. App. 11a ("Because the relevant section of the SPD *omits* the affidavit requirement, it conflicts with the Plan." (emphasis added)). In the court below, Petitioners had good reason not to press an argument that an SPD's silence cannot trump plan language: the Second Circuit effectively foreclosed that argument in *Layaou v. Xerox Corp.*, 238 F.3d 205, 211 (2d Cir. 2001) (indicating that an SPD's failure to "satisfy ERISA's disclosure obligations" – *i.e.*, its silence – is sufficient to permit recovery).